Setback to the Struggle for Free Speech on Race in Australia

Part 2

Nigel Jackson

Continued from **Setback to the Struggle for Free Speech on Race in Australia, Part 1**.

XIII

Andrew Bolt is one of the best-known and most-controversial journalists in Australia and has been so for many years. He is a thrice-weekly columnist for Melbourne's *Herald Sun* newspaper and generally defends traditional values and attitudes with a pugnacious, no-holds-barred writing style. He has taken a special interest in Aboriginal affairs and frequently clashed with Professor Robert Manne, a Jewish academic from La Trobe University, about the alleged "Stolen Generation" of Aboriginal or part-Aboriginal children. Bolt claims that there were no large-scale removals of children "for purely racist reasons." Manne disagrees. Bolt has noted many instances of contemporary Aboriginal children being left "in grave danger that we would not tolerate for children of any other race because we are so terrified of the 'stolen generations' myth."**[1]** He is also an opponent of the extraordinary current campaign, spearheaded by Tony Abbott, supported by both major parties and promoted by big businesses and influential individuals, to insert a clause or clauses into the Australian Constitution to "recognize" our indigenous people and their prior occupancy of the continent before the European takeover.

In September 2010 nine "fair-skinned Aboriginals" (as Federal Court judge Mordecai Bromberg referred to them in his judgment of the ensuing case) sued Bolt over articles he had published in 2009 in the *Herald Sun* and published on his blog. These suggested it was fashionable for "fair-skinned people" of diverse ancestry to choose Aboriginal racial identity for the purposes of political and career clout.**[2]** The applicants included Pat Eatock, Larissa Behrendt, Bindi Cole, Anita Heiss, Geoff Clark, Mark McMillan and Wayne Atkinson. They claimed that Bolt had breached the Racial Discrimination Act.**[3]**

On 28th September 2011 Justice Bromberg found in their favor. He stated in his judgment that "fair-skinned Aboriginal people (or some of them) were reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated" by the offending articles. "At issue was Bolt's assertion that the applicants had chosen to identify themselves as 'Aboriginal' and consequently win grants, prizes and career advancement, despite their apparently fair skin and mixed heritage." The articles, their counsel, Ron Merkel QC, had told the court, were, "a head-on assault on a group of highly successful and high-achieving Aborigines".**[4]**

Justice Bromberg ruled "people should be free to fully identify with their race without fear of public disdain or loss of esteem for so identifying." Bolt's argument (that the nine had multiple identities open to them) was seen by some as causing the case to become an unofficial test of definitions of Aboriginality.**[5]**

During proceedings it had become clear that Bolt had been very careless in preparing his articles for publication. They contained bad errors of fact. For example, he wrote as though some of the applicants had only recently assumed an Aboriginal identity, when in fact they had identified as Aboriginals from childhood. An extract from the ABC *News* is worth quoting: "The journalist told the court he did not

contact any of the subjects of his articles before publication and considered these a response to comments they had already made on the public record. An earlier witness, Professor Larissa Behrendt, said Bolt had used a photograph of her in an article picturing her with dyed blonde hair and commenting on her German heritage. She said that while her grandfather was born in England she had no knowledge of German ancestors, although she admitted her surname was German. She described herself as an Aborigine and said her father was an Aborigine and her mother was a white Australian. She told the court that she knew of a three-point test to decide if someone was an Aborigine in order to claim benefits. It covered a person's Aboriginal descent, their acceptance among the Aboriginal community and their own self-identification of being an Aborigine. She admitted it would be ludicrous to say you were an Aborigine if you had to go back seven generations to find black heritage."**[6]**

Controversy continues to rage in Australia over the nature of Aboriginal identity and the ways in which Aboriginals should be given privileged treatment.**[7]** Some people believe that the Aboriginal people have been used, and are still being used, as a means of covertly changing the nature of the Australian political order.**[8]**

The judgment of Justice Bromberg has been a subject of much discussion from the time that it was delivered. For example, veteran journalist Jonathan Holmes wrote: "His Honor's claim that his judgment need not affect the media's freedom to publish reports and comments on racial identity is clearly absurd… It appears to follow that any publication which discourages tolerance for racial diversity… is unlawful… Justice Bromberg makes it clear that if you write something that has a tendency to offend on the grounds of race, but you want it to be considered reasonable and in good faith, you won't necessarily get away with opinions that would in defamation law be covered by the fair-comment defense – opinions that are extreme, or illogical, or which 'reasonable people might find abhorrent'. On the contrary, says Justice Bromberg (in Paragraph 425), Andrew Bolt failed the test of reasonableness and good faith because 'insufficient care and diligence was taken to minimize the offense, insult, humiliation and intimidation suffered by the people likely to be affected by the conduct and insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice.' And he specifically mentions, not just the wrong facts, but 'the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides.'… [The judgment] creates one particular area of public life where speech is regulated by tests that simply don't apply anywhere else, and in which judges – never, for all their pontifications, friends of free speech – get to do the regulating."**[9]**

The national newspaper *The Australian* commented in an editorial: "Andrew Bolt was prosecuted last year for articles that railed against racism. He drew attention to grants and positions reserved for indigenous people and dared to question the Aboriginal credentials of some recipients. This was uncomfortable ground to tackle and Bolt used strident language, but no sensible person would dispute the need to encourage frank consideration of such issues. For those reasons this newspaper has criticized the court's decision (especially given Justice Mordy Bromberg's reasoning included such matters as the 'style and structure' of the articles and the conveyance of meaning 'beyond the literal meaning of the words'). This legislative and judicial overreach on racial vilification must be redressed."**[10]**

An Aboriginal spokesperson, Marcia Langton, remarked: "What Andrew Bolt and any interested in his case should know is that many Aboriginal people are just as cynical and skeptical about all the claims

made to Aboriginality by people raised in relative comfort in the suburbs. They cannot be described as disadvantaged unless you take seriously the racist proposition that one is automatically disadvantaged by having an Aboriginal ancestor. Being descended from an Aboriginal person who lived before British colonization is not sufficient reason by itself to hand out money to people who make a claim to being indigenous."[11]

One of Australia's most energetic and articulate defenders of free speech is James Allan, Garrick professor of law at the University of Queensland. He stated: "I still think that Judge Mordecai Bromberg's decision in the Bolt case was a poor one and an appeal had a very good chance of succeeding. There are several points at which Bromberg could have interpreted the statute in a more free-speech-enabling way. But at every single one of those he chose the path that stifled speech."[12]

And Chris Merritt, editor of the Legal Affairs section of *The Australian*, commented: "The absence of an appeal means the key issue at the heart of the case, the erosion of free speech, has been left unresolved. An appeal court ruling would have provided a conclusive decision on whether the Racial Discrimination Act was applied correctly in the Bolt case….. [The failure of the *Herald Sun* and Bolt to appeal] has encouraged Bromberg to believe he is required by law to take on the role of *uber-editor*, criticizing words and phrases and taking it on himself to list material that Bolt should have included in his columns. Within days, the nation will be treated to a spectacle that has no place in a free society. Bromberg, using the coercive power of the state, will force the free media to publish the judge's opinion."[13] And in another article Merritt noted: "This broke new ground for the judiciary and put journalists on notice that this law is unlike any other. They can now be held liable not just for what they write, but for what they do not write. Without the Bolt case, this statutory requirement for judicial over-reach might never have come to light. In this sense Bolt and those who pursued him in court have all served the public interest."[14] Another objection to the Act, as interpreted by Justice Bromberg, was that it took as the "key test" for culpability "what's offensive through the eyes of an idealized member of the group claiming victim status."[15]

Some of these misgivings may have been applicable to the Scully and Töben cases; but these defendants did not have the public prestige of Bolt nor such powerful friends. So no comparable public clamor on their behalf arose.

XIV

On 6 August 2012 the leader of the Opposition, Tony Abbott, delivered an address to the Institute of Public Affairs in Sydney entitled "Freedom Wars". As noted above, this landmark speech inaugurated an intense public debate in Australia over the question of the degree to which speech should be free in public discussion of issues involving race and ethnicity.

Abbott championed the "question everything" mindset that he saw as so important for national creativity and progress. He asserted that free speech is an essential foundation of democracy and of human integrity. He warned "a government that can censor a free press is quite capable of censoring a free people." He pointed out that "the price of free speech… is that offense will be given, facts will be misrepresented and lies will be told", and added that "free speech shouldn't be restrained just to prevent hurt feelings."

Abbott opposed the then-ALP government's proposals for changed regulation of the press: "In the hands of the current government, any new watchdog could become a political correctness enforcement agency destined to suppress inconvenient truths and to hound from the media people whose opinions might rattle Phillip Adams' listeners."[16] Abbott declared that "Australia does not need more regulation of the mainstream media, but we do need a new debate about freedom of speech."

He argued that the operation of Section 18C of the Racial Discrimination Act, which prohibits statements that "offend, insult, humiliate or intimidate" another person or a group of people on grounds of race or ethnicity was "a threat to free speech". He said: "A 'hurt feelings' test is impossible to comply with while maintaining the fearless pursuit of truth." In specifically addressing the Bolt case verdict, Abbott insisted that "people are entitled to be passionate when they are arguing for what they believe to be important and necessary. Speech that has to be inoffensive would be unerringly politically correct but it would not be free."

Abbott then made an important pre-electoral promise: "The Coalition will repeal Section 18C in its current form. Any prohibitions on inciting hatred against or intimidation of particular racial groups should be akin to the ancient common law offenses of incitement and causing fear." He added "expression or advocacy should never be unlawful merely because it is offensive." And he concluded by stating that his party, the Liberal Party, was "the freedom party."

Less than two months earlier Professor Allan had noted the successful return of free speech on race to Canadians: "Last week the Canadian parliament took the biggest step in repealing its national hate speech laws. It voted 153-136 to repeal Section 13 of the Canadian Human Rights Act, the enabling legislation that criminalized so-called hate messages. The parliamentary vote… went overwhelmingly along party lines, but one brave left-of-center MP voted for repeal… This happened despite the concerted efforts and laments of the human rights industry….. The forces at work against free speech can be overcome. If Canada can repeal its section 13 then we in Australia can repeal our Section 18C equivalent.' Allan concluded: 'One's position against criminalizing words that simply offend others is the most important issue Australians face at the next election."[17]

Abbott's IPA address now gave hope that needed reform would occur in Australia; and this gave increased confidence that eventually free speech on race would be returned to those many nations in Europe that have lost this right since World War Two.

XV

The attempt by the ALP Government to impose a stricter regulation of the media, together with the Abbott critique of the Racial Discrimination Act, led to some profound discussion of the importance of free speech within the political order.

Liberal Party elder and former MP David Kemp recalled how Sir Robert Menzies, Australia's greatest prime minister to date in the eyes of many, warned Australians in 1942 "against the organization of society around corporate interests at the expense of individual rights." Kemp expanded on this, writing that "to treat a sector of society, or the economy, as if it were a single interest with its own rights and duties, overriding the rights of the individual people within the sector, is to take an essentially fascist view of the world, destroying the rights of individual people by subsuming them into the 'rights' and 'responsibilities' of a sector of activity considered as a collective entity."[18]

A former chairman of the Australian Broadcasting Corporation, Maurice Newman, deplored a situation in which "legislators give judges amorphous powers to protect those who claim their sensibilities have been insulted on racial grounds" and a resultant situation in which "risky commentary will be left for closed doors, reinforcing prejudices and dividing the community." He reflected on the apparent ease with which the Government had organized its effort to regulate the media: "Once upon a time attacks on free speech would have sparked public outrage. Today, opposition seems mild. It is as though the populace has been conditioned to accept these attacks on the media's freedoms as being disconnected from its own liberty." He saw this as a result of the trend in recent decades towards "bigger government" which "for the growing political class means opportunities to dispense patronage to rent-seekers and special-interest groups." Thus he concluded "the balance of power tips inexorably in favor of the political elites" and is "indeed the road to serfdom." He regretted that "in a system where the power of individuals has been marginalized, the public has become detached." The older generation has "watched the slow attrition of their democratic rights without any sense of what was happening to them" and their children "have mostly been immersed in a curriculum that taught them government is the solution to all problems."**[19]**

The Opposition's legal affairs spokesman, George Brandis, analyzed the ideology behind those seeking to inhibit intellectual freedom. He pointed out that Ray Finkelstein in his report**[20]** favored what he called "social responsibility" over libertarian defenses of free speech. "The new intellectual climate places higher store in collectivist, societal values and less in individualistic values." Brandis warned against "a comprehensive challenge – arising from a modern-day puritanism, driven by an ideologue's intolerance of alternative or dissenting views, and condoned if not actually encouraged by a complicit government – to the very centrality of freedom of speech as one of our society's core values." The techniques of the challengers "are sometimes subtle, like the manipulation of language and the silencing of alternative voices."**[21]**

Editor-at-large of *The Australian* Paul Kelly warned: "The truth is that progressive political values are being transformed. Once progressives would have endorsed Voltaire (defending to the death your right to say it), but no longer. This value is subjugated to the new gospel that your speech must reflect progressive values and beliefs as part of legislating desired social behavior and respect for human rights."**[22]**

Mick Hume, in an edited extract from his book *There Is No Such Thing as a Free Press*, observed that "in today's hyper-sensitive, thin-skinned culture, you are more likely to hear the argument that, yes, we should support free speech, 'but' that does not mean you are free to condemn or offend others. In the run-up to the 2010 general election in Britain, the new Labor government issued a consultation paper on 'People and Power'. This document recognized 'freedom of expression as an important British value. However, it insisted that freedom comes with responsibilities – to 'be non-judgmental, open and encouraging', to avoid 'forcing our opinions on others' and to 'accept the consequences of being outspoken.'

"In other words, freedom of expression is dependent on not being too outspoken, critical or intemperate, and if you do offend others, you must accept the punitive consequences. Yet freedom of expression does not entail any such responsibility to be 'non-judgmental' or inoffensive. And defending those freedoms does not mean you have to endorse what is published… The bottom line is that infringements on that freedom are always worse and more dangerous to our society than the most

egregious abuse of freedom might be….. There are already far too many formal and informal constraints on a free press, from our execrable libel laws to the culture of 'you can't say that' that pervades the political and media class."[23]

Frank Furedi expressed similar sentiments: "One of the most dispiriting features of the spirit of our times is the formidable cultural valuation enjoyed by the sentiment, 'No, you cannot say that!'… The subordination of the freedom of expression to the objective of protecting people from frank speech speaks to an ethos that has a uniquely low opinion of the capacity of people to think for themselves. It is evident that supporters of hate speech laws and advocates of the policing of freedom of expression regard ordinary human beings as children who need to be protected from bad thoughts and offensive speech….. What's really offensive is not the speech but the arrogant assumption that would deny us the right to judge for ourselves how to interpret it….. The exhortation 'No, you cannot say that!' is really another way of saying 'not in front of the children'. It is a sign of the times that frank speech is frequently stigmatized as a form of irresponsible behavior."[24]

Information provided by Ron Merkel QC, the barrister who represented the plaintiffs against Bolt, needs to be set against this. He explained that Justice Bromberg "found that a particularly pernicious aspect of the [Bolt] articles was their intimidatory impact on younger Aboriginal people who may be more apprehensive about publicly identifying as Aboriginal. The judge found the ferocity of Bolt's attack on the individuals dealt with in the articles would have an intimidating effect on those people… the proceeding came about because of the distress caused by the articles to young Aboriginal law students and lawyers, members of Tarwirri, a Victorian association representing their interests." Justice Bromberg explained that "the disparagement of the 'others' in society because they belong to a racial group, stigmatizes the group's members, leading to racial prejudice, discrimination, social exclusion and even violence." Merkel believed that the Act had "nipped the harm in the bud."[25]

Ted Lapkin, a Jewish defender of free speech, remarked: "The quashing of speech on the basis of its political content is fundamentally inimical to democracy. Every point at which freedom of expression is curtailed by government coercion means a point where parliamentary debate and the media dare not go…Rather than promoting peaceful coexistence, this regime of political censorship sets loose the specter of official tolerance enforcers. The Racial Hatred Act empowers the paranoid and petulant. And by rewarding those with the biggest chips on their shoulders, it exacerbates the ugly victim-group sweepstakes that has come to dominate ethnic politics in Australia."[26]

XVI

In September 2013 the Liberal-National Coalition won the national elections and on 18th September Tony Abbott was sworn in as prime minister. Shortly before the elections *The Australian* had published a large news report on the plans of Senator George Brandis who now became Attorney General, the nation's chief law officer. Brandis had promised that "a Coalition government would use a revitalized human-rights agenda to challenge the dominance of the Left and protect common-law freedoms" that had been "eroded by previous governments".[27] He had also promised that "one or more 'freedom commissioners' would be appointed to the Australian Human Rights Commission" and honored this promise on 17 December by nominating Tim Wilson, a member of the Liberal Party and of the Institute of Public Affairs, as the new Freedom Commissioner. From that point on Brandis became the Government's main spokesman for the proposed reform of the Racial Discrimination Act; and his

vigorous public statements suggested that he had every confidence that his "freedom agenda" would be implemented.

Early in November Brandis had expanded on his perspective and intentions, as *The Age* reported from Melbourne: "Senator Brandis told *The Australian* that he was certain that the changes to the act would be viewed as the Government condoning racist behavior, but said he believed "you cannot have a situation in a liberal democracy in which the expression of an opinion is rendered unlawful because somebody else … finds it offensive or insulting. The classic liberal democratic rights that in my view are fundamental human rights have been almost pushed to the edge of the debate. It is a very important part of my agenda to re-center that debate so that when people talk about rights, they talk about the great liberal democratic rights of freedom of expression, freedom of association, freedom of worship and freedom of the press."**[28]** A few months later Brandis stressed that "laws which are designed to prohibit racial vilification should not be used as a vehicle to attack legitimate freedoms of speech."**[29]** A day later a prominent news report in *The Australian* headed "The recovery of liberty" featured a huge photograph of Brandis and noted that he "wants to be remembered for cultural change… the recovery of liberty."**[30]** Firmly supported by Abbott, Brandis appeared like a great cultural general well on the path to bringing significant change to the Australian political order.

Support for the Government's proposed reform continued to be vigorously expressed in public forums. James Allan noted that John Stuart Mill's famous thesis *On Liberty* "relied on a certain distrust of government and government agents and bureaucracies, and even judges." Allan asked: "What grounds are there, really, for thinking they know what is right and true and won't abuse their position when silencing people?"**[31]** David Rolph, an associate professor of law at Sydney University, pointed out that Section 18D "permits a greater intrusion on free speech than defamation law currently does" and that the defense of fair comment "is complex and technical and often difficult for defendants to establish." He felt that the Racial Discrimination Act and defamation law both needed reform.**[32]** One John Bell, in supporting the appointment of Wilson, noted that there had only been one "non-minority group recipient of a favorable tribunal decision in the history of the Human Rights and Equal Opportunity Commission" (himself), thus indicating the ethnic bias inherent in the act's working.**[33]** Chris Merritt bewailed "the overwhelming silence of the publicly funded human rights industry when freedom of speech is at stake."**[34]** An Eric Lockett addressed the legalistic "nanny state" mindset behind the act: "The law can never make people good – the best it can hope for is to protect the innocent from the wrong-doing of others… We kid ourselves if we think that the law can ever be a substitute for the moral education that was once delivered at our mothers' knees, or in Sunday school."**[35]** Major newspapers agreed that change was needed. In Melbourne *The Age* stated: "We believe Section 18C should be abolished… The danger in the present framework is that in trying to protect tolerance and freedom, the legislation diminishes both….. The best weapon against hurtful and even vile words is public ridicule, not suppression of expression."**[36]** *The Australian* presciently noted: "There is, sadly, only a small and quiet constituency for press freedom and free speech in this country." It asked: "But where are the champions, many of whom are leaders in the academy, media and social movements, when the most important human right of all, free speech, is under an all-out assault?"**[37]**

Michael Sexton SC addressed the inadequate terminology of racial vilification law: "There is room for argument as to whether the prohibition on intimidation should be retained, although this could normally be dealt with by the ordinary provisions of the criminal law. The notions of offense, insult and humiliation, however, involve hurt to feelings. This is always unattractive for the subject of the verbal

attack, but these shock tactics have always been legitimate tools of debate on questions of politics and public interest….. Some of the defenders of Section 18C describe it as a bulwark against 'hate speech'. One problem about this term is that it is now frequently used with reference to publications that are merely offensive. Hatred is a very powerful emotion and one, it might be thought, relatively rarely encountered."[38] Neil Brown QC commented on a different weakness in the act. He pointed out that in the Bolt case the judge "decided there was no role for community standards" in determining his verdict and "instead applied a test that gave priority to the views of the group claiming to have been offended." Brown suggested that liability in the future in such cases should be determined "according to community standards of propriety generally accepted by and expected of reasonable adults. And who better to determine whether an act offended community standards than the community itself by way of a jury?"[39] Of course, such a criterion might not achieve justice in every case: a Holocaust revisionist, for example, might still find himself disadvantaged as a result of prevailing public ignorance, itself brought about by bias in the public media. Former academic Merv Bendle dealt with another defense of the act brought up in certain quarters: "Claims that the repeal of Section 18C… might ''unleash a darker, even violent side of our humanity' are absurd and offensive….. This is not Nazi Germany, it is a highly tolerant society where an Aborigine has just been made Australian of the Year to general acclaim."[40]

Gary Johns, a former ALP MP, argued that intermarriage would be a more effective way of building racial harmony rather than "outdated laws". He pointed out that "the rate of intermarriage for Aborigines in Sydney, Brisbane and Melbourne is more than 80 per cent. Aborigines constitute 1 per cent of the population of these places: a tiny minority. In a sea of whites, Aborigines have high intermarriage rates."[41] *The Australian* drew attention to another problem faced by the Government: "Political correctness might have become so insidious that it is now a thought-crime to support the repeal of laws that stifle free speech lest we be tarred with the words of others."[42] James Allan attacked another plank depended on by opponents of reform: "I think important policy decisions ought to be made by the elected representatives of the people….. And not those who purport to be on the side of 'international law'. Take a closer look at international law sometime and you soon realize that treaties are made by the executive, over the head of legislature, and that so-called 'customary international law' hasn't got a democratic bone in its entire body."[43]

Tom Blackburn SC commented that section 18D does not offer a defendant sufficient protection. The term "good faith" cannot be simply equated with honesty and sincerity. This is because in a case known as Bropho it was determined that to show "objective good faith" a defendant must be able to demonstrate that he or she had (1) honestly and conscientiously had regard to minimize harm done; (2) acted with fidelity to the relevant principles in the act; and (3) indicated a conscientious approach to honoring the values asserted in the act. It might not be possible for an ordinary person to know enough law to abide by such a requirement.[44]

XVII

On 25 March 2014 the Government released an exposure draft detailing its proposed reforms to the act and called for public responses to its program. Sections 18B, 18C, 18D and 18E would be repealed. These would be replaced by a new section of four parts, as follows. "(1) It is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely to vilify another person or a group of persons, or to intimidate another person or group of persons, and the act is done because of the race, color or national or ethnic origin of that person or that group of persons. (2) For the purposes of this section,

"vilify" means to incite hatred against a person or group of persons, and "intimidate" means to cause fear of physical harm. (3) Whether an act is reasonably likely to have the effect specified is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community. (4) This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter."

For lovers of free speech, this was a big step in the right direction and was a much more decisive reform than that adumbrated by Tony Abbott in August 2012. However, in my two submissions to the consultation process I suggested further improvements, as follows. (1) The amendments to the act should contain a specific statement that the principle of free speech takes precedence over the principle of protection from racial vilification. (2) If the term "racism" is to be used, it should be carefully defined, since not all discrimination based on race or ethnicity is unjust or not in accord with truth. (3) The existing protection against intimidation should not be preserved in the act, as there is adequate protection against intimidation and menace elsewhere in Australian law. (4) The new protection against vilification should not be included in the amendments, because the phrase "incite hatred against" is too subjective. "Vilification" is also too vague and subjective a term. (5) If the protection against intimidation is preserved, then claims that it should encompass "fear of emotional harm" (as opposed to physical harm) should be rejected, as the criterion would be too vague and subjective. (5) One word should be added to the list of kinds of matter in public discussion. The word is "historical." Some of the most sensitive controversies bearing on race and ethnicity deal with historical topics. (6) Many valid arguments have been mounted to the effect that racial vilification is an evil which should be opposed and, where possible, curbed; but no successful argument has been raised by any person or body to show that the need to curb racial vilification is so important and so pressing that the basic principle of intellectual freedom should be forfeited.

XVIII

A torrent of discussion for and against the Brandis proposals now erupted in the public forums of Australia. Opponents of these changes unscrupulously made strident use of an unfortunate statement by the Attorney-General in Parliament to the effect that Australians "had a right to be bigots". He meant, of course, that they had a right to express views *which others would see as bigotry*. He was not defending bigotry as being socially desirable or worthy in itself of legal protection. This would have been obvious to any thoughtful observer; thus, the over-the-top response to his statement, which would be sustained over the next four and a half months, suggests that crusaders against free speech on race were either possessed by a blinding spirit of fanaticism or ruthlessly determined to get their way by foul means as well as fair. A slogan involving opposition to "giving the green light to bigotry" was erected like a Chinese wall to prevent reasonable discussion. Wilson, the new Freedom Commissioner for the AHRC, perceived this and at once noted that "free speech and acceptable conduct" were "incorrectly being conflated", since the overall issue was "not about the acceptability of racism."**[45]** And retired academic Merv Bendle observed: "Ever since the 17th Century and the abolition of the Star Chamber and the proclamation of the Bill of Rights, the battle for free speech has been waged against ruling classes and elites seeking to protect their entrenched interests against public criticism. As the Andrew Bolt case revealed, nothing has changed as favored groups seek to preserve their status and privileges by prohibiting debate. Consequently, the accusations of racism and bigotry being directed against the

federal government over its efforts to modify the RDA are merely a smokescreen and should be dismissed and George Brandis supported for his courageous initiative."[46]

Some Aboriginal Australians supported the Government plan. Sue Gordon, a retired Northern Territory magistrate, was reported as saying that "the repression of free speech was damaging to race relations" and that she agreed "that people had the right to be bigots".[47] A former member of the Government's indigenous advisory council, Wesley Aird, stated that the amendments were needed "to bring the act into alignment with the 'expectations of mainstream Australian society'."[48] Anthony Dillon, an academic at the Australian Catholic University, saw opposition to the reforms as counter-productive: "Promoting the message that Australia is a racist country comes at a cost; people will see no need to take responsibility for their lives. Claims of racism provide a perfect excuse for not having to make the lifestyle changes necessary to improve quality of life. They reinforce the victim mentality, where Aborigines are presented as victims of a racist country. Propagating such myths is far easier than addressing the tough problems mentioned previously. Yes, racism exists in this country. But we are not a racist country. There is an enormous amount of goodwill towards Aboriginal Australians and other ethnic groups. Claims of racism where it does not exist are more damaging to reconciliation and the health and wellbeing of Aboriginal people than real racism. If we are to get tough on racism, shouldn't we also get tough on people who promote it where it does not exist and accuse others of being racist simply because they have a message that may not be popular with a few?"[49] Andrew Penfold, the New South Wales Human Rights Ambassador and founder of the Australian Indigenous Education Foundation, stated: "We need to raise the threshold of section 18C so it only relates to serious vilification."[50] Aboriginal artist, activist and businessman John Moriarty also supported the proposed reform.[51]

The Australian drew attention to the world context of the controversy and to the poor understanding of many of the opponents of reform: "However well-meaning the views of opponents to the Abbott government's changes to race discrimination laws, many have a poor understanding of the inviolable place of free speech in our democracy….. Rather than being viewed as a one-off, Australia's debate over racial vilification needs to be understood within the context of international trends. In a drive to clamp down on statements perceived as offensive, freedom of speech is being trampled across much of the world." It also warned against "judicial activism", in deprecating Judge Bromberg's comments that the judiciary is a way of delivering "social justice".[52]

Neil Brown QC suggested that "if we really want community standards to prevail, we should have trial by jury, so these contentious issues can be resolved by the only body really qualified to do so: twelve good men and women. After all, if the purpose of such legislation is to protect the community from racist conduct, why not ask the community, in the form of a jury, if it thinks it needs to be protected from the conduct complained of?"[53] Noted American Jewish legal expert and activist Alan Dershowitz warned "democracy cannot survive a regime of governmental censorship."[54] Another Jew, a survivor from World War Two, Professor John Furedy, also issued a warning – against what he saw as a dangerous trend towards tyranny and argued that even "Holocaust deniers" should not be censored.[55] Former Prime Minister John Howard supported the reforms.[56] Michael Sexton SC pointed out that Sections 18C and 18D are much harder on a defendant than the corresponding clauses in defamation law, particularly as Section 18C is not concerned with truth or falsity. Thus "it is much likelier to be used… to attack controversial pieces of journalism or historical writing."[57] One Gabrielle Lord expressed surprise at "the lack of voices from the literary world" in support of reform and argued that "freedom is the

essential condition from which creativity unfolds and flourishes."[58] Tim Wilson observed (in contrast to those who claimed that Andrew Bolt had vastly greater resources than those he attacked) that "censorship favors the powerful because they can use and abuse it to advance their ends, and also favors those with resources to use the court system to silence and censor others. It is a common criticism of Australia's generous defamation law – it favors the rich from criticism."[59] Barry Cohen, a former ALP minister and a Jew, insisted that "racist ideas are more effectively countered in debate, rather than in court or jail".[60] Janet Albrechtsen, a political columnist with *The Australian*, discussed the change-of-heart of Canadian Alan Borovoy, who once supported legislation like section 18C but is now a disbeliever, as well as the experience of Mark Steyn, who fought the censors, and noted: "Debate in this country has become polarized between those on the Right who regard the individual right to free speech as more important than identity group rights and those on the political Left who cannot bring themselves to genuinely commit to free speech of opponents."[61]

One Evelyn Creeton wrote that "hate speech laws are the laws that now powerful minority groups use to silence their opponents but would never agree to apply to themselves. They know that postmodern judges will use positive discrimination to protect people and opinions they agree with, even if a statute does not authorize such unequal treatment and international law forbids it."[62] Canadian Mark Steyn, writing in *Spectator Australia*, commented: "I'm opposed to the notion of official ideology….. the more topics you rule out of discussion – immigration, Islam, 'gender fluidity' – the more you delegitimize the political system….. where we're headed [is] a world where real, primal, universal rights – like freedom of expression – come a distant second to the new tribalism of identity group rights….. Universities are no longer institutions of inquiry."[63] Political scientist Jennifer Oriel produced a profoundly damning analysis of the Racial Discrimination Act: "The open society dream of the West was based on the reign of reason over theocracy and the liberation of citizens from state dogma. Both precepts of open society are reversed in laws to censor speech that offends." She warned against "a gradual insinuation of ideology into the realm of Western jurisprudence" and its "reintroduction of state censorship under the guise of racial discrimination law." She explained that "the modern architect of civil accord by state censorship" was former Canadian prime minister Pierre Trudeau, "an ardent admirer of Mao Zedong's approach to multiculturalism." Oriel saw the Brandis reform proposal as seeking "to raise the evidentiary standard of justice from feelings of offense and group opinion to hard evidence and truth." It was now encountering a backlash "from those whose public status depends on manufacturing the illusion that personal perception and mob opinion constitute fact." In reality the proposal "extends the right of free speech to all Australians rather than reserving it for an elite class who can claim their words are especially academic, scientific or artistic."[64]

Journalist Brendan O'Neill wondered "Why the Left has turned against the masses" and observed that "the bulk of the Left has abandoned freedom of speech, …ceding the terrain… to the Right….. It is the newspapers that lean more to the Right that have loudly demanded reform of this legal restriction on what people can say, while papers that lean Left insist Section 18C must stay." [*The Australian* and *The Age* respectively demonstrate that divergence.[65]] O'Neill argued that "the Left lost its faith in everyday people….. [it] has become more and more cut off from ordinary people."[66] One Jim Ball responded that the role reversal on freedom of speech between Left and Right has occurred because "the Left is losing the argument in all respects as people are better informed and have more avenues available to vent their concerns and opinions". The communications revolution means that "the Left can no longer contain or control the flow of information".[67] Journalist Nick Cater claimed that "anti-

discrimination legislation is just a game for lawyers….. It is human rights devoid of any sense of proportion, prudence or natural justice."**[68]**

The former head of the South Australian Office of Multicultural Affairs, Sev Ozdowski, was another who supported the Brandis proposals, submitting that "it is difficult to find evidence [that] freedom of speech needs to be curtailed because it grows racism in Australia or because of sensitivities associated with Australia as a multicultural society." He felt that education was a much more effective way of tackling racism than legal sanctions. "There is no evidence that criminalization of so-called hate speech elsewhere in the world has markedly contributed to social peace and harmony….. The only exception to freedom of speech should be when it calls for action that could result in violence… and when it threatens national security and public safety."**[69]** That last point is dubious, since would-be censors have been known in Australia and overseas to deliberately threaten violence against right-wing speakers in order to get a suborned police authority to close down proposed meetings on that very ground – of public safety – rather than moving against the real trouble-makers. Chris Merritt pointed out that a danger has arisen of lawyers being seen as the natural allies of authoritarians, the latter in Australia being able to be identified "by their desire to extend state power in ways that erode the liberties that set this country apart from many of its neighbors." He stressed that the most important rights are "products of the common law, not the gift of governments or revered founding fathers."**[70]**

Gay Alcorn, a journalist with *The Age*, published a report on a long interview she had with Andrew Bolt (who writes for the opposition paper, the *Herald Sun*, which is, like *The Australian*, owned by Rupert Murdoch's News Limited. It was magnanimous of *The Age* to give Bolt this fair hearing.) Bolt felt that the case against him had been mounted essentially to outlaw an opinion and stressed his belief that even "Holocaust denial" (which he rejects) should not be outlawed. Brendan O'Neill strongly attacked the claim that racial vilification law is needed for social cohesion. He noted that "the language of liberty has been twisted by the AHRC to make illiberal things sound liberal, authoritarianism seem just and tyranny appear enlightened." He added that "most of the AHRC commissioners have "come down on the side of state control rather than individual liberty" and are "forever reminding folk their right to free speech can be rescinded if they say anything too outrageous or risky or threatening to public morals." O'Neill then went on the warpath: "The paternalistic notion that certain ideas must be hidden from view because they have the power to rattle society – or 'damage social cohesion', as [supporters of 18C put it] – has fuelled every act of censorship from Torquemada silencing morality-corrupting heretics during the Spanish Inquisition to British censors banning *Lady Chatterley's Lover*….. Arguing that prejudiced speech must be quashed to preserve social harmony may sound PC, but it's the bastard ideological offspring of the thirst for social control and fear of the unpredictable public that have motivated every censor." O'Neill proved his critique of the human rights movement, which he saw as coming out of "the darkest moment" of World War Two and the Nazi tyranny, by quoting from the websites of the AHRC and the European Convention on Human Rights. He contrasted this movement with that of the Eighteenth Century's democratic rights movement, which was about restraining the state from tyrannizing over individuals.**[71]**

Barrister Louise Clegg wrote an authoritative justification of Senator Brandis's remark that Australians have a right to be bigoted. She quoted from further on in his controversial speech, where he told ALP senator Penny Wong: "I would defend your right to say things that I consider to be bigoted and ignorant. That is what freedom of speech means." Clegg concluded that "it is quite clear that Brandis was not for a second promoting bigotry of any kind, let alone racial bigotry. Nor was he suggesting that he or we

should approve of or even tolerate bigotry. The senator's clear message was that it is not possible or desirable in a free country for the state to regulate what people think or say on the basis that other people might disagree with it, be offended by it or consider it bigoted or ignorant."[72] This had always been obvious and it is disgraceful that campaigners against reform so often and in so many forums grossly misrepresented the senator's position. Tim Wilson wrote a large article on the difference between the liberal tradition of human rights and the socialist approach. He provided a pertinent quotation from a speech by Sir Robert Menzies: "So few of us have objective minds – detached minds – and what we conceive to be the truth is very often coloured or distorted by our own passions or interests or prejudices. Hence, if truth is to emerge and in the long run be triumphant, the process of free debate – the untrammeled clash of opinion – must go on."[73]

Part-Aboriginal academic Anthony Dillon warned against a too-easy belief that words can hurt or offend: "People can just as easily choose not to take offense….. There seems no end to opportunities today for people to take offense, claim they are traumatized, and make someone else responsible for their suffering. Taking offense is all too often simply a ploy to silence opponents." He noted that in certain contexts involving racial discussion he could express his views without fear of being sued because his "ancestral mix includes some Aboriginality", making him and others like him beneficiaries of reverse racism. 'It's all too easy to misrepresent discussions that involve race, particularly if some feel uncomfortable with the content as being blatant racism. Let's not confuse the right to have open discussion on race matters with racial hatred."[74] Aaron Lane, a research officer with the IPA, drew on the recent Canadian experience of the repeal of Section 13, which had enabled Canadians "to seek legal redress against those who had offended them", with the result that defendants "could be subject to lifetime speech bans, as well as monetary penalties." Lane pointed out that this repeal had not led to the unleashing of racial hatred in Canada, thus arguing that repeal of 18C in Australia would also prove innocuous.[75] One Lindsay Dent agreed: "Canadians learned their lesson after fellow citizens had been hounded with long-running, costly litigation merely for making reasonable comments about race or religion."[76]

Journalist Nick Cater argued, in contrast to some supporters of 18C, that racism is uncommon in Australia. "Few people go bonkers on public transport. Fewer still are prepared to put their bigotry on display….. Racism is somewhat less entrenched in the Australian psyche than the politically correctors claim." He, too, felt that traditional law and public disdain were sufficient sanctions against the rare outbreaks.[77] History professor Ross Fitzgerald wrote against "the disturbing implication of an increasing tendency to blur the distinction between words and physical violence, and instead to argue that hurtful words and ideas are actually a form of violence." He insisted that "except as metaphor, words are not weapons and that, in terms of free speech, it is crucial to maintain the distinction."[78]

Gabriel Sassoon, foreign-media adviser to Hilik Bar, the Deputy Speaker of Israel's parliament, an Australian living in Tel Aviv, commented on a controversial anti-Jewish (or anti-Israeli) cartoon published in *The Sydney Morning Herald*: "This should not be the subject of a racial vilification claim….. Free speech is sacrosanct. I've broken with the ALP, of which I'm a member, and the Australian Jewish community in backing the Government's push to repeal Section 18C."[79] Liberal Democrat senator David Leyonhjelm also supported the Government: "The arguments against free speech are based on concerns about what people think. Preventing speech does not alter what people are thinking; indeed, it probably reinforces it. The only way to change how people think is by speaking about it." He intended to attend the AHRC's first free-speech seminar on 7th August.[80] Tim Wilson, the AHRC freedom

commissioner stated: “We need a fully informed debate about free speech, including the role played by non-legislative measures that help civilize conduct while avoiding the imposition of censorship.”[81] Cassandra Wilkinson, of the liberal-conservative think-tank the Centre for Independent Studies, warned that the net of censorship often catches those for whom it was not intended: “But I do want freedom of expression for a lot of people who are often deemed offensive. I struggle to see how one kind of free speech isn’t materially affected by the progress or regress of another.”[82]

XIX

Opponents of the proposed reform of the Racial Discrimination Act produced many arguments to support their position. (1) It would encourage racial bigotry, ethnic prejudice and racism, and give the green light to Holocaust deniers, thus leading to an increase in racism generally. (2) It would promote social disharmony and political division. (3) It is unnecessary, since the Act has not seriously eroded free speech. (4) The Act is in fact working well to diminish racism. Most cases brought before the AHRC are successfully conciliated and do not progress to a court hearing. For example, between 1989 and 2010 out of 3788 cases referred to the Commission only 68 were referred to a tribunal and only 37 of these were successful.[83] And Commission statistics for 2012-2014 are said to show that only 27% of 1399 reports related to racial hatred.[84] (5) The Act is necessary for Australia to fulfill its international obligations. (6) The Act protects vulnerable people, those who “have little voice” (in contrast, say, to an Andrew Bolt, who has a megaphone in the form of his columns, blog and other public appearances). (7) The Act actually enhances free speech, since the pain of racist abuse often disempowers victims from participating in public debate. (8) Children and adolescents of ethnic minorities may suffer a loss of dignity and security without the protection of the Act. (9) Hate speech is dangerous, as history shows, especially the history of Nazi Germany. (10) Many Australians underestimate the damage that racism can do, because, being members of the ethnic majority (Anglo/European), they do not experience it. (11) The Act has an educative function and shows the nation what kind of behavior is or is not acceptable. (12) Repeal would jeopardize the possibility of success for the proposed referendum to recognize Australia’s indigenous people in the Constitution. (13) The draft proposal’s definitions of “intimidation” and “vilification” are unsatisfactory.[85] (14) Almost all, if not all, of the nation’s representative groups of ethnic minorities are opposed to change.[86] (15) Inciting hatred or hate speech are not forms of legitimate public discussion, so that censorship of them is not an invasion of free speech. (16) Repeal threatens the quality of life of ethnic minorities in Australia, tending to marginalize them and make social equality impossible. (17) The Act in its current form enjoys widespread community support.[87] (18) Bad speech cannot always be overcome by good speech; and the speech of the weak may often be unable to counter the speech of the strong; so protections should stay. (19) It is in our national interest to keep the law as it is, for it gives us a better image with overseas nations, including our near neighbors in South-East Asia.

This summary of objections to the reform proposals has been drawn from opinion articles, news reports and letters to the editor published in two of Melbourne’s three major newspapers.[88]

What is most noticeable in the public utterances of persons and groups expressing such objections is their failure to address the real concerns of those who are aware how easily limitations on free speech for ideological purposes can be the first step towards subjection of a nation to authoritarian and then totalitarian tyranny. Very rarely do they show any sympathy for those whose intellectual freedom they seek to curb. Views on race different from their own are far too easily dismissed as racist bigotry. The

extraordinary phenomenon of the suppression of historical revisionists in many nations, mainly European, gets hardly a mention. One suspects that many of the objectors have taken on board the cause of racial equality as a kind of ersatz religion.

It is not that they have no case at all. Racist abuse can indeed be painful and dispiriting to its victims. Unjust discrimination because of ethnicity understandably rankles deeply. Winding back the protections of the Act is more likely than not to encourage such negative behavior (which is regrettable), though not, however, as drastically as the objectors claim. However, public encouragement of fair play, together with education (as opposed to indoctrination) and Australia's well-known tolerance summed up in the iconic phrase "the fair go", are better ways of reducing unjust behavior towards those of other ethnicity than a political censorship which abandons a vital ethical principle.

To what extent the Act has worked well – in reducing racism without limiting free speech – is debatable. Those assuring us that it has been a blessing rather than a curse are usually partisan anti-racists. Nor can one blame minority ethnic groups for seeking their own advantage by supporting current restrictions; but one is entitled to wonder how representative ethnic councils and committees are of their whole ethnic groups, and one can also regret that ethnic leaders have not been able to look at the bigger picture and put the welfare of the nation as a whole first, before seeking benefits for their own minority groups.

Another suspicion is that exaggeration of the hurt caused by unjust racial discrimination or racial vilification has often occurred during the national debate. The truth is that rejection can often have a bracing effect; and many persons of all ethnicities have shown throughout history a capacity to work their way through mistreatment to achieve fulfilling lives.

For these and other reasons it seems to me that the case against the Government's reform proposals ultimately fails to convince.

XX

From as early as February the newspapers began reporting stories indicating that the Government's free-speech campaign was in trouble. The suggestion was made more than once after 25th March that Senator Brandis's exposure draft would be very considerably watered down. Leaders of the Institute of Public Affairs expressed their concern that the Government's will was weakening under pressure. By early August observers on both sides of the debate probably expected that only a very minor reform would actually be attempted in the parliament. However, on 5th August the Prime Minister announced that the Government had decided to abandon its push to reform the Racial Discrimination Act altogether. He referred to the project as "a needless complication" and said bluntly that it was off the shelf. He took personal responsibility for the decision and stated that it was a "captain's call" which he had made. Abbott coupled this unexpected turnaround with announcements about Australia's role in opposing the terror tactics of Muslim fundamentalists and the need to keep local moderate Muslims on side. To many observers it seemed as though he was trying to camouflage an embarrassing back-down by rhetoric about the need to combat deadly danger both in Australia and overseas. Stories circulated that cabinet knew nothing about the back-down until the morning of the 5th. The evening before, Senator Brandis had appeared on Sky television and confidently defended the intention to press ahead with reform.[89] One story was that Abbott had actually notified Andrew Bolt of his volte-face before he

informed the cabinet.[90] Nevertheless, the cabinet unanimously supported his decision, determined, evidently, to maintain a public image of party unity.

During the next few days there seemed to be general agreement among political commentators across the spectrum that the Government had engaged in the back-down because the consultations process had shown that the repeal plan was widely unpopular, with minority ethnic groups almost universally hostile, as well as many other representative bodies, including the Coalition governments of Victoria and New South Wales. Compounding the Government's difficulty was the disunity within its parliamentary ranks. Ten or more backbenchers apparently opposed repeal, with a couple at least prepared to cross the floor on the issue. It was said that two senior cabinet members, Malcolm Turnbull and Joe Hockey, were also not in favor of change. There was concern that seats could be lost in the next national elections in electorates where large numbers of persons of minority ethnic groups lived.

It seems clear that the Government would have faced great embarrassment if it had introduced even watered down reforms in the House of Representatives. It might have suffered the humiliation of loss in the lower house if enough of its members broke ranks and crossed the floor. As for the Senate, it seemed obvious that it would reject any bill that came its way. Thus, in practical terms, the Abbott decision may have been no more than an acceptance of reality and a justifiable avoidance of waste of time and money on a doomed cause. However, his mode of explaining the capitulation was not entirely credible or creditable.

While there was natural jubilation among those who had opposed change, some deriding the Government for ever having engaged in its campaign and others commending it for listening to the public and accepting its verdict, there was shock and disappointment among those who had supported repeal. James Allan bitterly condemned the "caving in to the special pleading lobby groups" and stated that he was skeptical that there really were a lot of MPs "in electorates where there will be more votes for them in caving in than there would be for proceeding on principle." He felt that the Government should have insisted on getting its bill passed in the lower house, even if Senate rejection later was inevitable.[91] Andrew Bolt suggested that "surely the ethnic communities which produced those jihadists and the 21 Muslims we've jailed on terrorism offenses already need exactly the kind of scrutiny too easily shut down with cries of 'racism'" and asked: "Does free speech really have so few defenders?"[92] In a second column Bolt lamented that "now Australia assimilates to the values of the immigrants – including the most oppressive values….. muzzling Australians is now seen as necessary to please migrant communities." He condemned "politicians… so desperate for these blocs of ethnic votes that they sacrifice Australian values to accommodate imported ones." Bolt expressed especial concern that the unrepealed restrictions of Section 18C "stifle two important debates as the country slides towards this dangerous new tribalism. The first is over the Government's racist plan to change the Constitution to recognize Aborigines. Should we really be divided by law on the basis of the 'race' of one or more of our great-grandparents? To me the answer is clear, but the Racial Discrimination Act makes it dangerous to give examples of just how preposterous and artificial this racial division is." The other debate is "how to deal with the growing threat of radical Islam."[93]

The Australian laid blame on Senator Brandis for the failure of the reform plan: "But the Attorney-General's public advocacy has been poor, and the argument was effectively lost when he said: 'People do have a right to be bigots, you know.'" The newspaper, like several other commentators, noted that the senator's statement had actually been factually true. "However, it was poorly expressed, politically

naïve and provided his opponents with the opening they needed. Labor and its fellow travelers have portrayed the reforms as an attempt to make bigotry legal and even legalize racism." The newspaper condemned this tactic: "The Greens-Left clique that tends to dominate political debate showed itself incapable of a mature consideration of these issues, as the ABC, Fairfax [publisher of *The Age* and *The Sydney Morning Herald*] and much of the gallery [of journalists at Parliament House] focused on Senator Brandis's gaffe as if it presented the central argument and overriding intent of proposed changes."**[94]** The *Herald Sun* asserted editorially that the back-down's "impact on freedom of speech is nonetheless damaging….. Criticism can now be curtailed on the basis that someone doesn't like what you said. This is an attack on free speech, no matter how that might be denied by some ethnic, religious and cultural groups."**[95]** *The Age* supported the back-down because "the changes proposed were inherently flawed, and the way the Government went about promoting them was unnecessarily inflammatory." It made the same criticism of Senator Brandis's notorious remark as did *The Australian*. It made a very muted criticism of the Act's "low legal threshold" for breaching the law, then firmly rejected the Government's omission of "psychological harm" as cause for complaint in the exposure draft and asserted that the proposed new exemptions were too wide. *The Age* also noted that the consultation process had drawn "more than 4000 submissions" (other sources say they were over 5000) and that "about 75% were opposed to any change" (according to Professor Simon Rice of the Australian National University).**[96]**

The Institute of Public Affairs was obviously furious about Abbott's decision and took out a full page advertisement in *The Australian* addressing him, quoting from his speech to it in Sydney in 2012: "Freedom of speech is an essential foundation of democracy." The Institute then commented: "We agree. That's why we will fight to repeal Section 18C of the Racial Discrimination Act. Even if you won't."**[97]** This was possibly an injudicious and quixotic response, smacking of sour grapes.

Senator David Leyonhjelm insisted that "nothing makes up for the loss of free speech" and reminded people that "laws limiting racist speech are not really about speech at all, but are intended to prevent unacceptable thoughts." He was unimpressed by Abbott's excuse about the need for national unity and felt that Australians should "harden up." In a liberal democracy "free speech must be the default option, with every encroachment subject to strict justification."**[98]** Michael Sexton SC queried the extent of public opposition to the proposed reforms: "It is important to reject the suggestion – implicit in much of the reporting on the Government's decision – that it represents an acceptance by the Government of the view of a majority of the Australian community. Common sense suggests that a majority of the community does not have a developed opinion on this or many other questions of public policy….. The fact most of the submissions to the Government on this issue favor the retention of Section 18C says nothing about the true state of popular sentiment but a great deal about the power of these lobby groups." Sexton pointed out, too, that "if it is really true that there is overwhelming popular support for 18C, then surely it is unnecessary." He suggested that the back-down "reveals where the power really lies in our political system, and it is not with the majority, prejudiced or unprejudiced. The ethnic lobbies and the highly organized 'human rights' industry (which has obvious interests in discovering 'racism' around every corner) were able to prevail against an elected government that at one point seemed determined to overhaul this bad law, the real function of which is not to protect vulnerable individuals from racist abuse but to limit public discussion of highly charged questions on which people can legitimately disagree." He concluded that "the general cause should [not] be abandoned."**[99]**

Prominent monarchist and liberal conservative commentator David Flint agreed with Sexton: "It is true that the lobbies opposing change were able to put in more submissions against the exposure draft….. These hardly measure public concern about the Bolt case. Unlike the various lobbies that put in submissions, the rank and file are neither organized nor subsidized to make submissions. Nor should it be thought that this concern is limited to right-wing Tories. It probably extends to traditional Labor supporters, as well as those in many immigrant communities." Flint felt that there are grounds for a "reconsideration of the interpretation of the section and exemption [18C and 18D], probably at the highest level – the High Court." He justified this by questioning the judgment of Justice Bromberg. "Another judge could have come to different conclusions on the facts; for example, that there was not a sufficient nexus between the articles and the applicants" race….. While finding a nexus between the articles and race, another judge might not have found it 'reasonably likely to offend.' Yet again, another judge might have found that the articles represented a genuine belief held by Bolt, made reasonably and in good faith. The judge might have agreed that Bolt's mistakes were not such as to deny him the defense, or that he should not be marked down for 'inflammatory and provocative language.'" Flint felt that the judgment was "a particularly minimalist interpretation of the 18D exemption". He queried "whether the legislation is constitutionally valid." This is because, as interpreted by Bromberg, "Section 18C is more about promoting multiculturalism and racial diversity than acting on racial discrimination. The relevant treaty, the UN Convention on the Elimination of All Forms of Racial Discrimination is only about racial discrimination. Does the external affairs power [in the Constitution] authorize this? And if the legislation is to be given a wide interpretation adopted by Justice Bromberg, is it still consistent with the freedom of political communication that the High Court has found to be implied in the Constitution? It can be argued that on this interpretation, Section 18C with 18D goes beyond being reasonably appropriate and adapted to serve a legitimate end. It could be said that this is not compatible with the maintenance of government prescribed by the Constitution."**[100]**

Journalist Nick Cater joined his voice to those skeptical of claims that most Australians wanted no change. He pointed out that "free speech is, and always has been, popular among Australians, a people with a hard-won reputation for speaking their minds" and asked: "Who can tell whether the views of, say, the West Australian Somali Cultural Awareness Association were broadly in line with those of the public? Ditto the views of the Aboriginal and Torres Strait Islander Reference Group, the Secretariat of National Aboriginal and Islander Child Care, the Australian Tamil Congress, the Australian Lawyers Alliance, the Aboriginal Legal Service of WA (Inc.), the Muslim Legal Network, the WA Muslim Lawyers Association, and many, many more." Cater saw "the new establishment, the enforcers of political correctness who remain firmly in control of most of Australia's cultural institutions" as the winners from Abbott's decision. "The repeal of 18C was a disruption to the grievance industry's business model that they could not countenance." Perhaps too optimistically, Cater added that he felt that such people had only obtained a Pyrrhic victory: "The chances of its [18C's] illiberal provisions being exploited again in a case like the one brought against Bolt are practically zero. The toxic influence of the Bolt case on the climate of public debate is recognized as a price too high to pay by the wiser heads on both sides of the cultural divide….. The real issue is not 18C but the illiberal climate that encouraged the complainants in the Bolt case to pursue their audacious case….. For the first time in decades the rights industry is fighting to hold its ground rather than planning its next great adventure."**[101]**

One Leni Palk drew attention to the fact that submissions on 18C by group bodies may not have represented truly the views of all members: "I am a lawyer. I belong to the Law Society in SA. It belongs

to the Law Council of Australia. I don't support the retention of 18C. When the Law Society adopts a view, it somehow decides for itself. I often disagree strongly with the position it adopts, but it never asks me what I think and probably isn't interested." Claims as to what "the legal profession" thinks and believes should not be taken to assume that lawyers "all sing with one voice."**[102]**

David Kemp, a former Coalition cabinet minister under John Howard [PM from 1996 to 2007] and current president of the Liberal Party in Victoria, expressed deep concern at the Government's back-down, which he wrote had "shocked many Liberals" and was having "repercussions through the Liberal Party". He argued that hitherto the Party had seen itself as having "a historic role, a special responsibility, to defend… fundamental freedoms of speech, press, religion and association", this self-interpretation being based on the ideals espoused by the Party's founder, Sir Robert Menzies, seventy years ago. "Menzies was very aware of the tendency of politics to degenerate into the appeasement of powerful vested interests. The only way for a government to rise above the struggle of vested interests for privilege, he argued, is to persuade people of the principles on which the public interest is based." Kemp defended free speech and insisted that there was wide support in Australia for amending Section 18C. "To describe reforms to restore freedom of speech as a 'needless complication' in the effort to appease certain interests is to seriously misunderstand, and to affront, many Liberals, and I suspect a good number in the communities concerned. To suggest that national unity requires a legal prohibition on offending certain select groups is unbelievable and demeaning to all." He warned that the Act "subjects our culture to the discretion of tribunals that easily end up sounding like star chambers."**[103]**

Further criticism of Justice Bromberg's decision in the Bolt case emerged from Chris Merritt, who suggested that it was a judicial error not to have applied community standards rather than those of the group complaining – "an embarrassing deviation from orthodox concepts of fairness." In particular, Merritt drew attention to what he called a "notorious observation" by the judge that "to import community standards into the test of the reasonable likelihood of offense runs the risk of reinforcing the prevailing level of prejudice." Commented Merritt: "If there is any passage of case law that deserves to be torn up and discarded, this is it. It suggests that Australians, on the whole, are racially prejudiced and their standards are flawed."**[104]**

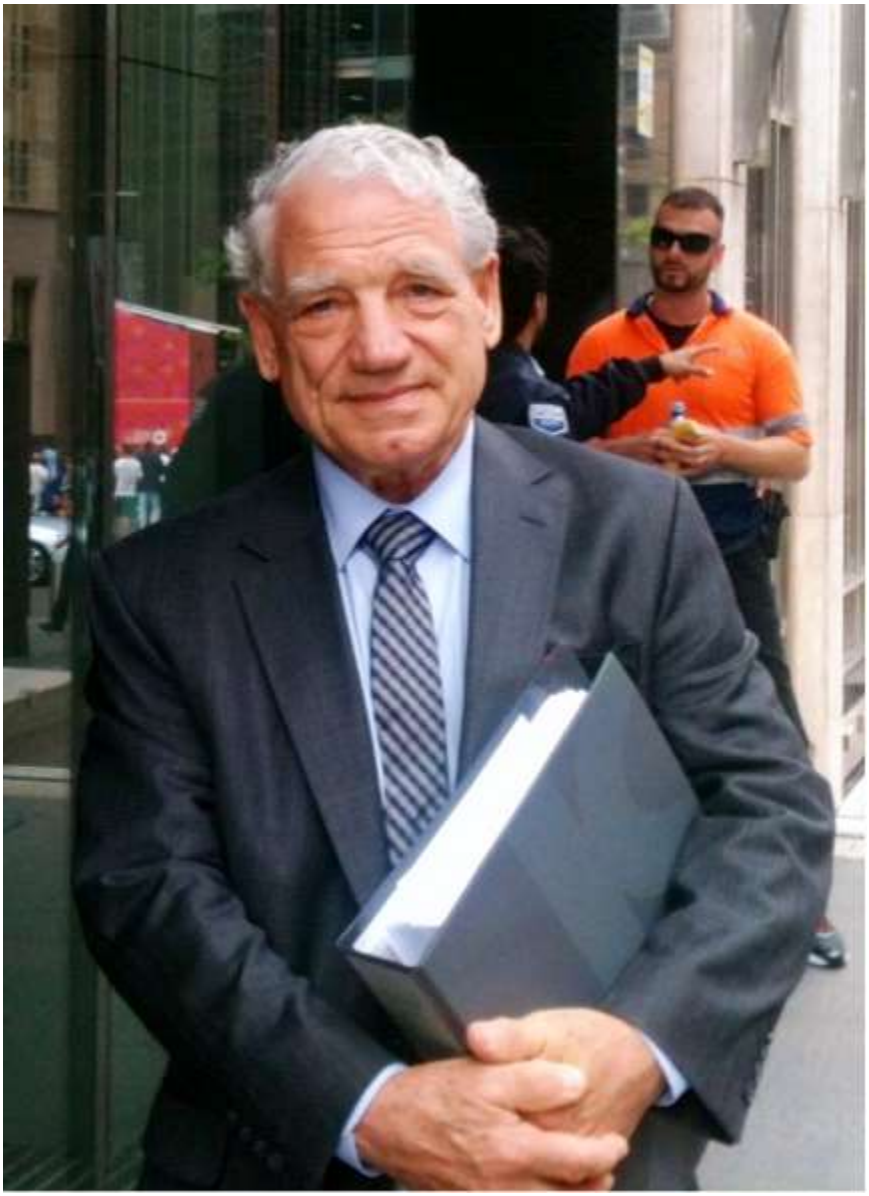
James Allan returned to the attack with interesting commentary on the behavior of the parliamentary Coalition members: "I was speaking recently to a government backbencher. It quickly became apparent that this MP had been one of those not in favor of proceeding with the Section 18C repeal. But you know what? This MP didn't even know that Canada's parliament had repealed the Canadian equivalent of our 18C hate speech laws. He didn't have a clue….. So in selling the repeal to caucus it would seem that no one had taken the time to point out that they'd done this in Canada." Allan added: "Ask yourself why a political party that has at most one seat at risk from the dislike of the 'ethnic vote' of a Section 18C repeal would weigh that as more important than the supposedly core beliefs of the Liberal Party and its longstanding supporters."**[105]** Mike Keane, a medical specialist, challenged the validity of Justice Bromberg's statement that none of the applicants against Bolt "chose" to be Aboriginal, arguing that "identity, like any other form of consent, is a completely contemporary phenomenon. He claimed that the judge's decision was "ideologically charged intellectual sophistry" and deplored "the intimidation that results from the fear of being at the behest of a judge."**[106]**

A South Australian senator, Bob Day, of the Christian-based Family First party, was so incensed by the Government's reneging on its promise that he decided to move a private member's bill to remove the

words “offend” and “insult” from Section 18C (the minimalist reform that had been advocated by Spencer Zifcak of Liberty Victoria and many others). He was supported by Liberal Democrat senator David Leyonhjelm and two rebel Liberal senators, Cory Bernardi and Dean Smith.[107] It was expected that other Coalition senators would combine with ALP and Greens senators in voting against the bill on grounds of party loyalty.

XXI

While, from the time of Justice Bromberg’s decision on, there has been enormous and most detailed discussion in Australian public forums (in connection with the free speech issue) of Andrew Bolt’s journalism, the judge’s finding and associated Aboriginal issues, a quite different phenomenon can be noted in the way in which a different associated topic has been handled. I refer to what has usually been referred to as “Holocaust denial”, although I believe that “Holocaust revisionism” is a better, though not completely satisfactory, term.



Dr. Fredrick Töben, author of "Where Truth is no Defence, I Want to Break Free." Photo taken at Martin Place, Sydney. Published with permission of Fredrick Töben

In the first place, very many commentators (politicians, journalists, public figures, letter writers and others) on the issue have felt it appropriate or necessary to condemn "Holocaust denial" or "Holocaust deniers" in their statements. It is astonishing just how many have done so, almost always, if not always, with no attempt to defend their point by reasoned argument or evidence. In order to show just how pervasive this behavior has been, I propose to list most of my collected examples in an endnote.**[108]** There are thirty-six examples there. By contrast there has been an almost total absence of support published for revisionist historians who query the received account of the Holocaust. *The Age* published a letter by me on 11th November 2013 touching on that view. I related "necessary protections against racial discrimination" (which the paper had editorially advocated) to the London Declaration on Combating Anti-Semitism and wrote: "For too long certain groups and individuals, in Australia and overseas, have sought to use legislation against 'racial vilification and hatred' to further their own interests at the expense of the intellectual freedom of others." On 28th March 2014 *The Australian* published a letter by me in which I noted that "while there have been a number of derisory comments about Holocaust deniers, there has been no serious and informed debate about the overseas persecution of revisionist historians and whether we want that here."**[109]** The paper also published two letters by me defending Fredrick Töben. In one I suggested that "he is better described as a Holocaust revisionist, signifying that he has had the courage to challenge aspects of a key dogma of the age."**[110]** In the other I wrote that my earlier letter had "sought explicitly to balance an unfairly negative image of the man and implicitly to protest at a person being made a social pariah because he has expressed unpopular and controversial views."**[111]** *The Australian* also published a letter in which I noted that "overseas, another problem has been that judges may take judicial notice of certain issues under contention, which means the position of one side is taken as gospel truth and the other side barred from even putting an argument."**[112]** In yet another published letter I commented that "an unwelcome adverse criticism of a person or a group or an accepted view of history may be perceived by some as vilification when it is valid intellectual dissent."**[113]** These letters were merely a drop in the ocean of hostile comment about Holocaust deniers.

It must be admitted that it is very strange that there was so much negative commentary published on Holocaust denial and deniers, with virtually no attempt at justifying argument (occasionally certain assertions were made as though these proved the point). It was strange, too, that at such a time in the national life, when freedom of speech was a major topic of discussion, that public forums avoided publishing opinion articles exploring the nature and history of historical revisionism in general and Holocaust revisionism in particular. However, for much longer than the last three years, there seems to have been a widespread policy of not publishing anything favorable to such research. Freedom Commissioner Tim Wilson opined in one article that "it is not censorship for a newspaper to refuse to give offensive views a platform."**[114]** Such is not necessarily always the case; and the habit of regularly publishing negative assessments of a position or a group of people without allowing them commensurate right of reply may well be political censorship exerted not by government but by media.

After all, if Holocaust revisionists are so stupid and so completely in error, as many commentators have averred, how come that they are so feared and so continually denigrated? The suspicion must arise that there is something fishy in the situation. As anyone who has bothered to actually read in detail the works of leading historical revisionists, such as Robert Faurisson, Germar Rudolf, Jürgen Graf, Wilhelm

Stäglich, Arthur Butz, Carlo Mattogno and many others, it is utterly plain that misrepresentation on the grand scale is involved. The truth is, then, that in Australia recently we have witnessed mass vilification of, and hatred towards, a group of people as part of the national debate about vilification law, and that this vilification has often been made by those favoring repeal of the law and putting themselves forward as defenders of free speech! One is reminded of Puck's words in *A Midsummer Night's Dream*: "Lord, what fools these mortals be!"

It is interesting to see how prominent Jewish activist Jeremy Jones contributed to the debate. He claimed that for more than eighteen years of the operation of Section 18C, "in all that time, precisely one adjudicated complaint has been the subject of public controversy."**[115]** He meant the Bolt case, of course. Jones referred in the same article to the Scully and Töben cases, as well as to two others involving what he felt was unfair treatment of Jews and each of which was dealt with without court action being necessary. He may have been right that the Scully and Töben cases excited little controversy at the time, but there are grounds for thinking that they should have been examined in much greater and more judicious detail by the media than was in fact the case. That is to say, they were not allowed to become controversial. It is interesting to note, in this context, that Senator Brandis, when he had announced the exposure draft, was asked whether there were cases other than that of Bolt where free speech had been stifled and could not – or did not – name a single one.**[116]** Perhaps he chose not to refer to the Scully and Töben cases through fear of being seen as a supporter of Holocaust deniers!

That the media may be to blame for an unhealthy situation of covert censorship to have developed in recent decades is suggested by behavior of *The Age* during the recent controversy. On 14th May the paper published a dramatic front page story headed "Holocaust denier backs Brandis race hate law" and sub-headed "The notorious Fredrick Töben may soon be free to deny this happened." "This" was a photograph of prisoners in striped prison uniform behind barbed wire in what was evidently a German concentration camp. Now Töben has never denied that there were Nazi concentration camps in which prisoners were kept behind barbed wire and made to wear striped prison uniforms. However, when a letter was submitted pointing this out, *The Age* refused to publish it. Indeed, both *The Age* and *The Australian* declined during the national debate to publish any article speaking well of Holocaust revisionism, although I submitted several.

It is hard to see how *The Age* can justify such barefaced misrepresentation. Its behavior is a stark reminder of the fact that both the term "The Holocaust" and the term "Holocaust denial" are loaded and not neutral or impartial. Ordinary people who have never studied the writings of Holocaust revisionists genuinely imagine that they do deny that there were Nazi concentration camps in which many Jews and others were imprisoned. The revisionists do not, of course. But the blanket term "The Holocaust" has an ambiguity which suggests it. If *The Age* had published a picture of a homicidal gas chamber, it would have been a different matter; but perhaps it did not because none are available, for the simple reason that the gassing in Nazi camps really was directed against vermin to disinfect clothing and minimize infection by typhus or cholera, and not against human beings.

Töben is prone to exaggerate at times. *The Age* was able to report that he had claimed that the Racial Discrimination Act is a "flawed law, which only benefits Jewish-Zionist-Israeli interests" and that 18C and 18D are in fact a "Holocaust protection law." In his submission on the exposure draft he had apparently stated that "the 'Bolt law' case was used in an attempt to hide this Holocaust matter and to make it a

free expression issue…..the sole aim of this section has always been to legally protect… the Holocaust-Shoah narrative." There is, of course, much more to the Act than that. There are many different persons and groups who have supported it, and (in some cases) benefited from it, apart from Jewish persons and groups. On the other hand, there is no doubt that many Jewish commentators have seen the Act as protecting their special interests, quite apart from its other functions.

The Age report included various condemnations of Töben. Senator Brandis was reported as having said that he is a "nutter" and that views he had heard attributed to him "are absolute rubbish." Jewish spokesman Peter Wertheim commented: "Töben has spent a large part of his life vainly attempting to rehabilitate the disgraced record of Nazi Germany." Tsvi Fleischer, another Jewish spokesperson, stated that Jews "do fear that people like Töben will be able to say whatever they want – which is usually how evil the Jews are all the time." There he or she, like Töben, was grossly exaggerating. And ALP senator Lisa Singh was reported as claiming that Töben "is wrong in almost everything he says." All of these comments are mere invective, of course.

The next day *The Age* returned to the attack on Töben.**[117]** The paper also published a harrowing story of a 92 year-old Holocaust survivor, Moshe Fiszman, who warned that the "forces of darkness" would be unleashed if race-hate laws were watered down. It is hard to see much sign of such forces in laid-back Australia!

Two correspondents to *The Australian* brought the question of Holocaust denial and the Act into a sensible context. James Miller commented on an article by Mark Leibler: "If… Leibler's true agenda is to retain so much of 18C as is required to block Holocaust denial, surely the proper way forward is for an open debate about the wisdom of a specific law to shut down such views."**[118]** And Sholto Douglas disagreed with a prior suggestion that Holocaust denial should be outlawed in order to win Jewish support for free speech in other contexts of race. He pointed out that such legislation would not only be "illiberal", but that "other groups will ask why Jews alone should have their sensitivities protected."**[119]**

Journalist Nick Cater did give a kind of consideration to the problem of Holocaust revisionism within the controversy.**[120]** He referred to revelations by former ALP cabinet minister Bob Carr of the degree of power exercised over the Gillard government by Jewish lobby groups and sub-titled his article: "Bob Carr's claim of a fateful faction has fired up the Fuhrer-fawning fringe." It was soon evident that he was referring to Töben, whom he termed an "ignominious pretender", and the Adelaide Institute. There followed the usual sort of invective: "Töben's notoriety has ensured years of publicity. He has become a martyr within a minority of the community who regard him as a serious historian. The attempt to shut him down has reinforced their belief in an internationally sanctioned conspiracy….. Töben is an altogether more ugly beast….. Holocaust denial undoubtedly is offensive, insulting and humiliating." However, he argued that it "in itself does not fall into the narrow category of things that can justifiably be suppressed." Cater even teetered on the brink of opening up serious discussion about what really happened in wartime Nazi Germany, referring to "the blueprints for the factories of mass slaughter built at Auschwitz in 1943" and "architects Walter Dejaco and Fritz Erl." Robert Faurisson, no doubt, has argued that any such blueprints referred to facilities to deal with vermin, but that is another matter. Cater also referred to Primo Levi who, he claims, "had the measure of these close-minded con men" (Töben and others). It is doubtful that Cater has read Faurisson's detailed studies of how Levi's testimony changed over the years in a most suspicious manner.

Some more questionable assertions were provided by Jewish former ALP minister Barry Cohen.[121] He began his article with historical assertions that I do not believe are in accord with reality: "As General Dwight Eisenhower led the Allied forces that swept across Europe, he could not believe what he saw as he walked through the concentration camps and gas chambers in which millions of Jews died, along with social democrats, communists, Gypsies, homosexuals and any group hated by the Nazis. Eisenhower demanded that everything be recorded so future generations couldn't claim it didn't happen. It hasn't stopped the idiot brigade from spreading their vile ideas. Fortunately, most of the world's population know what happened during World War II and they believe it." Eisenhower no doubt visited German concentration camps and instructed his personnel to record details; but most or all of the rest of Cohen's assertions may be his own elaboration on what occurred and how it is viewed.

Finally, it is worth recording Andrew Bolt's own opinion on this aspect of the national debate. "Holocaust denial demeans us, it trivializes us. If we as a society don't have it in us to laugh at Holocaust deniers and denounce them with our words and not the law, then we really are in a sorry mess."[122] However, he opposed banning it by law.

All in all, the handling of the topic of Holocaust revisionism by the media in Australia during the past three years would appear to have been neither comprehensive nor impartial, this raising the question of how much they really are committed to free speech, their editorial claims notwithstanding.

XXII

Why did it happen? Why did the Abbott government fail so ignominiously to return free speech on race to Australians? The way in which the back-down was announced raised immediate suspicions that the alleged need to preserve national unity and win the support of friendly and moderate Muslims in the war against Islamist terrorists was being used as an excuse to camouflage what had really occurred and hide the real truth of the cause or causes of the retreat. *The Age* published a letter of mine challenging the Government: "The Prime Minister's explanation for the Government back-down on changes to the Racial Discrimination Act rings hollow. The campaign by sectors of Australian society against reform clearly indicated that we are beset by disunity on matters of fundamental principle within our political order. Terrorism can be fought without resort to abandoning free speech. The suspicion is that the Government has been forced to back down by fear of divisions among Coalition MPs becoming apparent, to the detriment of the image of government unity, and by the danger of the loss of marginal seats at the next elections."[123]

What, however, if even those explanations are operating as a cover to conceal what really happened behind the scenes? A day or so later I read an article by Brenton Sanderson on the website of *The Occidental Observer* which fuelled my concern. Heading his article "Australian PM caves in to Jewish lobby on free speech laws", Sanderson drew attention to an article written by Jewish activist and former editor of *The Age* Michael Gawenda in *Business Spectator*.[124] On the basis of this article Sanderson concluded that what had really happened was that Abbott and his Government had capitulated to "a coordinated and sustained campaign initiated and led by Jewish activists." Gawenda had asserted that "the Jewish community leaders have played a crucial role in organizing opposition to any potential change to the Racial Discrimination Act. It is the opposition of the Jewish communal leaders that had been of major concern to Brandis and…Tony Abbott."[125]

Sanderson commented: “It is a measure of the power wielded by organized Jewry in Australia that the Prime Minister would rather damage his political credibility by breaking a clear election promise than suffer the consequences of defying the single most powerful group in Australian society.” He brushed aside Gawenda’s purported reason for this obsequiousness: “Gawenda is disingenuous in claiming that the source of the Jewish community’s power in this debate resides in its being a ‘role model for successful multiculturalism’ rather than in its status as a group with the kind of financial, political and media clout to instill genuine fear in those who oppose its interests. As in the United States, Jewish money exerts a dominating influence over Australian politics.”

Gawenda tried to dismiss such an interpretation in his piece. He stated that he was not “wishing to give succor to those who reckon the Jews are too powerful”; and he derided any reader of his article who might “believe that there is a secret cabal of Jews who control Australia – its financial institutions, the media companies, the professions, the courts.” A bullying and jeering tone seems to be detectible in these remarks, and it is difficult not to believe that Gawenda was actually engaging in an act of boasting, despite his disclaimers. “Look, you fellows! See how powerful we are!”

Over forty years ago Wilmot Robertson published a profound study of changes within the United States political order, *The Dispossessed Majority**[126]*** Robertson argued that the US majority, British in ethnicity, had been effectively dispossessed of its control of the nation by ethnic minorities and their supporters. He included a 45-page study of the role played by Jewish-Americans. At the present time it appears as though a similar change has happened in Australia. All of a sudden we no longer have a major political party committed to genuine intellectual freedom. Does the suppression that has occurred and is still occurring in many European nations lie just around the corner for us?

It may be difficult to avoid it. Our best literary and ideas magazine, *Quadrant*, appears to be thoroughly unsympathetic to Holocaust revisionism. Its May 2014 edition carried an orthodox (or *bien-pensant*) article entitled “The Lethal Ideology of Holocaust Inversion” by Daryl McCann.**[127]** The June edition carried an editorial dealing with the campaign to reform the Racial Discrimination Act, in which the editor stated that Richard Evans’s book *Telling Lies about Hitler* “not only cost [David] Irving his case [in the British High Court in 2000], it systematically destroyed the credibility of the entire genre of Holocaust denial”, which is a “sleazy business.” *Quadrant* chose not to publish a short letter I sent querying this sweeping judgment, but in its September edition it published a letter from Jewish intellectual Mark Braham claiming without qualification “Holocaust deniers are proven liars.”

The most important organization in the land that publishes dissident views on Holocaust revisionism and other ethnic controversies is the Australian League of Rights, but it appears to have little influence and was not included to any significant degree by *The Australian* and *The Age* in their coverage of the 2012-2014 debate. Perhaps the most encouraging sign is the large number of voices that defended free speech in *The Australian*. In the meantime, however, we are licking our wounds after a most unwelcome reversal of fortune.

Notes:

[1] Wikipedia entry for Andrew Bolt, accessed 30th August 2014.

[2] The articles were titled: “It’s so hip to be black”, “White is the new Black” and “White Fellas in the Black.”

[3] Wikipedia, op.cit.

[4] “Andrew Bolt loses racial vilification court case”, Michael Bodey, *The Australian*, 28th September 2011.

[5] “Bolt loses high-profile race case”, Karl Quinn, *The Age*, 28th September 2011.

[6] “Angry Bolt rejects ‘eugenics’ claim,” Tim Callanan, 30th March 2011.

[7] See Peter B. English, *Land Rights – Birth Rights (The Great Australian Hoax)*, Veritas, WA, 1985. For example: “…agitation for Land Rights has not come from Aborigines themselves as direct descendants of the pre-colonization inhabitants of Australia, but from people of mixed racial origin to whom no reference was made in the Constitution, the 1967 Referendum Question nor the Constitutional Amendment resulting therefrom….. half-castes, half-breeds and people of lesser Aboriginal blood are the *product of* and *succeeded* colonization by ‘other race‘ immigrants from 1788 onwards and, as such, cannot be regarded (ethnically or legally) as being ‘people of the Aboriginal race.” (pp 94-95) That is one view. By contrast, consider what happened at a conference held under the auspices of the Whitlam ALP government in May 1973: “For voting purposes, the conference unanimously resolved that ‘an Aboriginal’ should be defined as: ‘A person of Aboriginal descent, who identifies as an Aboriginal and is accepted as such by the community with which he is associated.’” “This resolution,” comments English, “was the fatal decision that… was the gateway leading to developing racial tensions…” (p 65) The Whitlam government’s approach ensured that there would now be a much larger number of “Aboriginals” in Australia than under earlier definitions – this leading inevitably, and possibly by design, to a more explosive political situation thereafter.

[8] See Geoff McDonald, *Red over Black*, Veritas, WA, 1982. McDonald, a former Communist, had as his central theme “that Australia’s future as a free Western nation was seriously threatened by two movements: one to use the Aboriginal “land rights” issue to eventually establish a separate Aboriginal nation under Communist domination; and the second to fragment a homogeneous and stable Australia by a breaking down of the traditional immigration policy, and by the deliberate fostering of a multiculturalism which could only end with the Balkanization of Australia.” (p v)

[9] “Bolt, Bromberg and a profoundly disturbing judgment”, Jonathan Holmes, *The Drum*, ABC, 30th September 2011.

[10] “Race law fight distracts focus from disadvantage”, 8 August 2012.

[11] "Get rid of race to stop racism", *The Australian*, 31 August 2012. Marcia Langton was at the time the foundation chair of Australian indigenous studies in the University of Melbourne.

[12] "Race-hate laws must be repealed", *The Australian*, 21 October 2011.

[13] "Erosion of free speech is left unresolved", *The Australian*, 21 October 2011.

[14] "Abbott taps consensus on race act", *The Australian*, 10 August 2012.

[15] James Allan, "Coalition must go further on its defense of free speech", *The Australian*, 17 August 2012.

[16] Phillip Adams is a brilliantly successful writer and journalist of (usually) left-wing views. However, he has also often defended free speech, although his voice was largely silent on this issue after Abbott's address.

[17] "True beauty of free speech", *The Australian*, 15 June 2012.

[18] "It's fine to have standards of speech, enforcing them by law is fascism", *The Australian* 17 July 2012.

[19] "Sound of silence kills free speech", *The Australian*, 23 July 2012.

[20] Ray Finkelstein QC, Federal Court judge, headed an allegedly "independent" Media inquiry (instituted by the ALP Government) from 14 September 2011 which examined the Australian media industry's regulatory framework. The inquiry's report was presented to the Government on 28 February 2012.

[21] "Our right to free speech is under attack", *The Australian*, 21 August 2012.

[22] "Labor wrong on freedom wars", *The Australian*, 8 August 2012.

[23] "We're still a long way from press freedom with no buts", *The Australian*, 22-23 September 2012.

[24] "Hate campaigns against freedom of speech go all the way back to Socrates," *The Australian*, 4-5 August 2012.

[25] "Freedom to vilify must be checked by freedom from racial vilification", *The Australian*, 21 November 2011.

[26] "Opposition leader embraces multiculturalism as Dutch walk away", *The Australian*, 28 June 2011.

[27] "Brandis to reclaim rights agenda", *The Australian*, 30 August 2013.

[28] "Brandis to repeal section of anti-racism law", 9 November 2013.

[29] "PM defies rebels, communities on freedom of speech", *The Australian*, 19 March 2014.

[30] 20 March 2014.

[31] "'Bolt law' vow must be kept", *The Australian*, December 2013.

[32] "Free speech crying out for orthodox reform", *The Australian*, 13 December 2013.

[33] Letter in *The Australian*, 20 December 2013.

[34] "Rights commission's odd man out must fix an orthodoxy of selective silence", *The Australian*, 20 December 2013.

[35] Letter in *The Australian*, 28-29 December 2013.

[36] "Freedom of speech needs liberating", 21 December 2013.

[37] "The Left goes missing in defence of free speech", 19 December 2013.

[38] "We all have a right to free speech and it should be no crime to offend", *The Australian*, 3 March 2014.

[39] "Let community rule on discrimination", *The Australian*, 7 March 2014.

[40] Letter in *The Australian*, 7 March 2014.

[41] "Race-hate war is already won", *The Australian*, 12 March 2014.

[42] "Political class only paying lip service to free speech", 12 March 2014.

[43] "Pollies should keep their word", *The Australian*, 14 March 2014.

[44] "All comment is fair as long as it's based on fact", *The Australian*, 21 March 2014.

[45] "Free speech is best medicine for the bigotry disease", *The Australian*, 26 March 2014.

[46] Letter in *The Australian*, 28 March 2014.

[47] "People should have the right to free speech, says indigenous leader", *The Australian*, 27 March 2014.

[48] "Act failing to stop black-on-black racism", *The Australian*, 29-30 March 2014.

[49] "Claims of racism more damaging than the real thing", *The Australian*, 27 March 2014.

[50] "Your rights and responsibilities", *The Australian*, 1 April 2014.

[51] "Moriarty backs Brandis on rights", *The Australian*, 4 April 2014.

[52] "Smothering free exchange of ideas a dangerous path", 29-30 March 2014.

[53] Letter in *The Age*, 1 April 2014.

[54] "Bans on bigotry backfire", *The Australian*, 2 April 2014.

[55] "Survivor wary of 'velvet totalitarianism'", *The Australian*, 2 April 2014.

[56] "Howard backs race act changes", *The Australian*, 3 April 2014.

[57] "We need more than libel laws", *The Australian*, 4 April 2014.

[58] Letter in *The Australian*, 4 April 2014.

[59] "Insidious threats to free speech", *The Australian*, 5-6 April 2014.

[60] "Racist ideas are more effectively countered in debate, rather than in court or jail", *The Australian*, 5-6 April 2014.

[61] "One voice on free speech," *The Australian*, 9 April 2014.

[62] Letter in *The Australian*, 17 April 2014.

[63] "The slow death of free speech", 19 April 2014.

[64] "State censorship of speech kills off the free-thinkers", *The Australian*, 19-20 April.

[65] While *The Age* editorially argued for reform of 18C, its overall reporting of the whole controversy has been in striking contrast to its editorial stance.

[66] *The Australian*, 26-27 April.

[67] Letter in *The Australian*, 28 April 2014.

[68] "Play the race card, get out of jail", *The Australian*, 29 April 2014.

[6] "Human rights expert backs changes to 18C", *The Australian*, 1 May 2014.

[70] "Lawyers must man the rampart of freedom", *The Australian*, 2 May 2014.

[71] "Abolish the Human Rights Commission, and return us to the Enlightenment's positive values", *The Australian*, 3-4 May 2014.

[72] "ABC could have fact-checked with Chairman Jim before judging Brandis", *The Australian*, 6 May 2014.

[73] "Opening minds to 'forgotten freedoms'", *The Australian*, 17-18 May 2014.

[74] "Don't confuse the right to discuss race matters openly with racial hatred", *The Australian*, 2 June 2014.

[75] "Canadians lead the way on free speech", *The Australian*, 13 June 2014.

[76] Letter in *The Australian*, 14-15 June 2014.

[77] "Natural justice wins the day", *The Australian*, 8 July 2014.

[78] "Stop hiding behind legislation and allow speech to flow freely", *The Australian*, 19-20 July 2014.

[79] "Forget 18C: just rake paper over the coals", *The Australian*, 1 August 2014.

[80] "Leyonhjelm backs Brandis's free-speech stand", *The Australian*, 4 August 2014.

[81] Ibid.

[82] "Be careful what you wish for: bans and censorship tend to bite the hand that voted for them", *The Australian*, 7-8 June 2014.

[83] "Free speech or hate speech? The issue dividing Australia" by Gay Alcorn, *The Age*, 29 March 2014.

[84] "18C not stopping racism, says law expert, as Hawke urges no change", *The Australian*, 28 March 2014.

[85] "A-G's plan falls short of aims", Spencer Zifcak, *The Australian*, 4 April 2014. Zifcak, a professor of law at the Australian Catholic University, was surely correct to claim that the Brandis plan "defines vilification and intimidation in terms far more limited than their generally accepted meaning". He argued that a minor repeal, removing only the terms "insult" and "offend", would be the best solution. This minimalist position undoubtedly would enjoy majority public support (compared to keeping the Act as it is).

[86] For example, *The Sunday Age* reported on 27 April 2014 ("Rebel MPs defiant on hate laws") that the Government proposals were opposed by "a powerful coalition of ethnic and religious groups" including Jewish, Chinese, Armenian, Arab, Korean, Greek, Vietnamese and Sikh groups. And *The Age* stated on 15 May 2014 ("Community groups join on hate laws") that "at least 60 groups have lined up against the changes". These included "a number of groups representing Aboriginal and Torres Strait Islanders" as well as some non-ethnic bodies such as the Law Council of Australia and the Australian Confederation of Trades Unions. On 17 April 2014 *The Australian* reported ("Dump race hate reforms: migrants") that "the 190 ethnic communities of New South Wales" urged that no change occur. It was referring to a submission lodged by the Community Relations Commission of that state.

[87] Several such claims have been made. For example, in *The Age* on 29 March 2014 Tim Soutphommasane, the AHRC's Race Discrimination Commissioner, wrote ("What kind of society favors bigotry?") that "a recent survey conducted by researchers at the University of Western Sydney showed that between 66 and 74 per cent of Australians agreed or strongly agreed that it should be unlawful to offend, insult or humiliate on the basis of race". It has to be noted that such surveys may not be true indicators of overall popular feeling on the whole issue of free speech and racial language. Researchers are not always impartial; questionnaires are not always appropriately and equitably worded; selection of those questioned may be biased or otherwise unfair. On the other hand, Soutphommasane is certainly right to add: "The majority of Australians have a strong commitment to racial tolerance."

[88] The opinion articles include the following. From *The Australian*: "Anti-abuse laws pose no real threat to freedom of speech", Daniel Meyerowitz-Katz (policy analyst at the Australia/Israel & Jewish Affairs Council), 9 December 2013; "Debate unites unlikely bedfellows", Spencer Zifcak, 28 February 2014; "Let's preserve our best legal weapon against racism", Jeremy Jones (director of international and of community affairs at the Australia/Israel and Jewish Affairs Council); "Auschwitz: why I can't back Brandis on free speech", Graham Richardson (former ALP federal cabinet minister), 28 March 2014; "Race law changes seriously undermine protections", Gillian Triggs (president of the AHRC), 28 March 2014; "Race act debate misses the point", Warren Mundine, Aboriginal leader), 1 April 2014; "A-G's plan falls short of aims", Spencer Zifcak, 4 April 2014; "Repeal protects right of bigots", Craig Emerson (former ALP federal cabinet minister), 5 April 2014. From *The Age*: "Beware any move to license racial hatred", Tim Soutphommasane, 3 March 2014; "A war of words over words that wound", Michael Gordon, 15 March 2014; "Sneers of political correctness hamper race debate", Bruce Grant (author and former diplomat); "Brandis, bigotry and balancing free speech", Andrew Lynch (director of the Gilbert and Tobin Centre of Public Law at the University of New South Wales), 26 March 2014; "Free speech is often not so free, Mr Brandis", Peter Balint (Lecturer in Politics at the University of New South Wales), 27 March 2014; "Brandis' race hate laws are whiter than white", Waleed Aly (Muslim leader), 28 March 2014; "What kind of society favours bigotry?", Tim Soutphommasane, 29 March 2014; "The fault line that runs through the land", Warwick McFadyen (journalist, in the *Sunday Age*), 30 March 2014; "Abbott's double act of competing narratives", Michael Gordon (political editor), 5 April 2014; "Curse of Australia's silent pervasive racism", Waleed Aly, 5 April 2014; "We must stamp on the cockroach of racism", Tim Soutphommasane, 8 April 2014; "Beware a single-minded protector of freedom", Sarah Joseph (director of the Castan Centre for Human Rights Law at Monash University), 9 April 2014; "Hate speech bill protects the right to intimidate and vilify", Jonathan Holmes, 23 April 2014.

[89] "PM could learn from Pyne's approach", Peter van Onselen (a University of Western Australia professor),*The Australian*, 9-10 August 2014.

[90] Ibid.

[91] "Craven cave in on free speech", *The Australian*, 6 August 2014.

[92] "Who will dare to defend free speech?", *Herald Sun*, 6 August 2014.

[93] "We're muzzled, but bigots rant", *Herald Sun*, 7 August 2014.

[94] "Freedom's just another word", 7 August 2014.

[95] "Watch what you say", 7 August 2014.

[96] "Abbott capitulates on race debate", 7 August 2014.

[97] In the edition of 8 August 2014.

[98] "Nothing makes up for silence", *The Australian*, 7 August 2014.

[99] "A pity about 18C, but there will be other free speech battles", *The Australian*, 8 August 2014.

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the sociology professor."; "Survivor wary of 'velvet totalitarianism'" (news report), *The Australian*, 2 April 2014, "Notorious Holocaust-denier and anti-Semite Ernst Zündel….. 'I have long been disgusted by Zündel's publicly stated anti-Semitic opinions.'"; "Bans on bigotry backfire", Alan Dershowitz, *The Australian*, 2 April 2014, "Jews demand an end to everything deemed to be anti-Semitic, which can include Holocaust denial."; "Repeal protects rights of bigots", Craig Emerson (former ALP cabinet minister), *The Australian*, 5 April 2014, "Yet the Government has assured the Jewish community that Holocaust denial would remain unlawful. Why? If freedom of speech is paramount, it follows logically that racial vilification – defined as inciting hatred – should be lawful."; "Hate speech best defeated in a free exchange of ideas", *The Australian* (editorial), 5-6 April 2014, "In a thoughtful article, columnist and former Labor senator Graham Richardson said no ideal of free speech should ever be allowed to make a mockery of the degradation and despair of the millions who died in the Nazi concentration camps."; "One voice on free speech", Janet Albrechtsen (columnist), *The Australian*, 9 April 2014, "No one minded this stuff [Section 13 in Canada] when it was just being applied to some Holocaust denier sitting in his bedsit writing some unread screed that he was Xeroxing and sending out to his friends."; "Jewish leader eyes middle path on race act reform" (news report), *The Australian*, 15 April 2014, "Many within the Jewish community are fiercely opposed to the proposed change, arguing that it would allow Holocaust revisionists to air their views without fear of reprisals."; "Maybe we shouldn't have racial vilification laws at all", Gay Alcorn, *The Age*, 25 April 2014, "Why should it be unlawful for an idiot like Fredrick Töben to claim the Holocaust never happened?"; "Rebel MPs defiant on hate laws" (news report), *Sunday Age*, 27 April, "Another flashpoint is that the proposed changes appear to give free rein to Holocaust denial and other forms of anti-Semitism."; Letter by Moshe Gutnick, Yehoram Ulman and Meir Shlomo Kluwgant (Jewish rabbis), *The Australian*, 3-4 May 2014, "This week, by coincidence, Jewish communities around the world marked Holocaust Remembrance Day. None of us dares forget, and Wilson and the Government would do well to remember that racist words have evil consequences."; "Lib states' blow to Brandis race bid" (news report), *The Australian*, 3-4 April 2014, "NSW and Victoria have combined to pressure the Commonwealth to dump proposed reforms of the national race-hate laws, warning it will lead to an increase in racial intolerance and Holocaust denial,"; Letter by Merv Bendle, *The Australian*, 5 April 2014, "That [the Bolt case] seems to have been forgotten and the focus now is on the suppression of Holocaust denial….. the moronic claims of a small number of anti-Semitic fanatics."; "Craven cave in on free speech", James Allan, *The Australian*, 6 August 2014, "Apparently the Government now implicitly agrees that you can't trust your average Australian to see through the rantings of Neo-Nazi Holocaust deniers."; "Ditch the dodgy policies, Tony", Graham Richardson, *The Australian*, 8 August 2014, "I cannot handle Holocaust deniers. Knowing an Auschwitz survivor who suffered appallingly and who lost many close family members means that I can't be a party to anyone getting up and saying that her pain is nonsense. The Holocaust is not a fabrication or a

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[109] Letter published on 28 March 2014.

[110] Letter published on 25 June 2013.

[111] Letter published on 1 July 2013.

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[113] Letter published on 22 November 2011.

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[115] "Let's preserve our best legal weapon against racism", *The Australian*, 18 March 2014.

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[117] "Community groups join on hate laws", 15 May 2014.

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[119] Letter published on 6 May 2014.

[120] "Diary changes agenda", *The Australian*, 15 April 2014.

[121] "Racist ideas are more effectively countered in debate, rather than in court or jail", *The Australian*, 5-6 April 2014.

[122] "Setting the record straight", *The Age*, 3 May 2014.

[123] Letter published on 7 August 2014.

[124] The name Brenton Sanderson is unknown to me. The writer appears to be remarkably well informed about Australian affairs, so that I believe him to be an Australian writing under a pen name. His article was published on 8 August 2014.

[125] "The real reason Abbott broke his promise on Section 18C", *Business Spectator* online, 6 August 2014.

[126] Howard Allen, Box 76, Cape Canaveral, Florida 32920, 1972.

[127] *Quadrant* is edited by Keith Windschuttle, who has published important research exposing left-wing misrepresentations of past interactions of European settlers and the Aborigines. Its editorial address is Suite 2/5 Rosebery Place, Balmain, NSW 2041.

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